IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76 - 76-6784

CARL LAMONT BAYLESS,

Petitioner,

v.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT
OF CERTIORARI TO THE
SUPREME COURT OF OHIO

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Ohio entered November 24, 1976, rehearing denied December 22, 1976.

CITATIONS TO OPINIONS BELOW

The opinions of the Ohio Supreme Court are reported at 48 Ohio St. 2d 73 (1976) and are attached as Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Does the imposition of petitioner's death sentence violate the Sixth, Eighth, Tenth or Fourteenth amendment to the Constitution of the

United States?

2. Were petitioner's Sixth and Fourteenth Amendment Rights denied by the empanelling of people who were unable, as a result of extensive pretrial publicity, to function as impartial jurors?

3. Were petitioner's Sixth and Fourteenth Amendment Rights denied by the exclusion of prospective jurors with conscientious scruples against capital punishment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth, Tenth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of Ohio Law:

Ohio Rev. Code Ann. §2903.1 (1974). Aggravated murder.

> (A) No person shall purposely, and with prior calculation and design, cause the death of another.
>
> (B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.
>
> (C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

Ohio Rev. Code Ann. §2929.02 (1974). Penalties for murder.

> (A) Whoever is convicted of aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

* * *

Ohio Rev. Code Ann. §2929.03 (1974). Imposing sentence for a capital offense.

> (A) If the indictment or count in the indictment charging aggravating murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.
>
> (B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge, whether the offender is guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.
>
> (C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdit of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined.
>
> > (1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;
> >
> > (2) By the trial judge, if the offender was tried by a jury.
>
> (D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric

examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the argument, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

Ohio Rev. Code Ann. §2929.04 (1974). Criteria for imposing death or imprisonment for a capital offense.

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

(1) The offense was assassination of the president of the United States or person in line of succession to the presidency, or the governor or lieutenant governor of this state, or the president-elect or vice-president elect of the United States, or the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of the course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance [preponderance] of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under stress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

STATEMENT

STATEMENT OF THE FACTS

On February 26, 1974, between 8:00 and 10:00 P.M., Mr. and Mrs. Paul Anthony were abducted at gunpoint from the parking lot of the K-Mart Shopping Center at Wooster Road and South Hawkins Avenue in Akron, Summit County, Ohio. (Tr. X at 2253-29). The abductor took the Anthonys to Perkins Park in their late model Cadillac, shot them, and took their car and their personal valuables. (Tr. VIII at 1780-2014 and 2037-62; Tr. X at 2260-63).

At about 2:00 A.M. on February 27, petitioner Carl L. Bayless committed an armed robbery at Church's Chicken, an Akron carry-out restaurant, on Copley Road. At this time, Bayless and his accomplice, Coley Smith, Jr., were driving the Anthonys' automobile. (Tr. X at 2265).

About 4:30 A.M. that same day, the Akron Police Department discovered the Anthonys' bodies in the park. The police had been led to the scene by an informant, Samuel Howze, Jr. (Tr. VIII at 1778-1817 and Tr. VII at 1607-1610).

The same day, at approximately 8:00 A.M., Akron police officers arrived at the home of Mrs. Ada Bayless. The police arrested Carl Bayless, having received information allegedly linking him to these murders. (Tr. IX at 2068-2071).

Thereafter, petitioner was indicted on four (4) counts of aggravated murder and three (3) counts of aggravated robbery.

Extensive newspaper, radio and television began at this time and continued throughout petitioner's trial. The "Bayless case" became a focal point for criticism of the police, the courts and juvenile custodial procedures in this State. The prior juvenile record of the petitioner and the nature of the crimes allegedly committed by him received widespread publicity.

Two special venires were summoned, comprising about one hundred and fifty people. A jury was selected, and petitioner's trial commenced.

At trial, there was a conflict of evidence as to who had committed the murders. Compare, Tr. VII at 1595-98 and Tr. IX at 2125-26 with Tr. X at 2253-59.

The informant Howze and the robbery accomplice Smith turned State's evidence. They claimed that Bayless had admitted committing the murders. Howze and Smith both denied participating in the Anthonys' abduction and murder.

A prosecution witness did not approach the police until several days after Bayless' widely publicized arrest. Joseph Thomas then contended that petitioner admitted he "killed somebody." (After this alleged admission, Thomas nevertheless received from Bayless stolen property of the Anthonys.) (Tr. IX at 2125-26).

Petitioner testified that Howze had abducted the Anthonys. Petitioner had attempted to follow Howze in another car, but was unable to join him until Howze alone came from the park in the Anthonys' Cadillac. (Tr. X at 2253-59)

According to Bayless, Howze did not say what he had done with the Anthonys. Howze simply indicated that he had left them in the park. Bayless and Howze then divided the Anthonys' valuables and, later on, after Howze and Bayless had abandoned their search for a place to rob, Howze gave the Cadillac to petitioner. Bayless later told of using that car in the restaurant robbery with Smith.

During the trial, and at the sentencing hearing, there were conflicts in expert testimony. Dr. Kinsley, petitioner's psychologist, testified that in his opinion Bayless was mentally deficient and criminally insane at the time of the commission of the crime. (Tr. IX at 2212-13, 2214-15 and 2243). Court-appointed psychiatrists disagreed with this opinion during trial and at the sentencing hearing. (Tr. X at 2387-2398 and Tr. XI at 2559-2607).

The petitioner plead not guilty and not guilty by reason of insanity to the Anthonys' murders. He also plead not guilty by reason of insanity to the armed robbery of the carry-out restaurant.

On March 19, Dr. German was appointed in the place of Dr. Kern. These psychiatric examinations were conducted, and the reports thereof filed in the record of this case.

On March 21, 1974, the State filed a "Motion to Reconsider Deposition"; a "Motion for Joinder of Offenses"; a "Request for Discovery" and a "Motion to Amend Count V of the Indictment."

On April 1, 1974, the State filed a "Motion for Additional Special Venire," which was granted and names of seventy-five (75) additional veniremen were selected.

Petitioner's counsel filed a "Motion for Discovery" on April 1, and a "Motion to Suppress Certain Evidence" on April 8.

Petitioner next filed a "Motion for Extension of Time for Trial" on April 15, and on April 16, entered pleas of not guilty and not guilty by reason of insanity. On that date, the trial court ordered a journal entry filed nunc pro tunc, and dated March 18. The entry took petitioner's motion for a change of venue under advisement and overruled petitioner's motions to dismiss the indictment to inspect the grand jury minutes, and to strike the indictment's aggravated specifications.

On April 16, the trial court overruled the State's motion to reconsider the deposition of a witness and ordered that deposition set for April 17. At this time, the State's motion to amend in part Count V of the indictment was granted, the petitioner's motion for continuance of the trial was overruled, a hearing on the motion to suppress was set for April 18, and a sanity hearing was set for April 19.

On April 17, the trial court ordered that Counts I and III be severed for the purposes of trial and Counts II, IV, V, VI and VII proceed as scheduled. The State's motion to amend Counts II and IV by addition of a word, was granted.

Petitioner's motion to suppress evidence was heard and decided on April 18. The trial court ordered that certain evidence seized be

suppressed. All remaining branches of that motion were then overruled. The next day, after the sanity hearing, the court found petitioner presently sane, capable of understanding the nature of charges against him and able to counsel in his own defense.

On April 22, an amended bill of indictment was filed charging defendant with two counts of aggravated murder and one count of aggravated robbery.

On April 22, the preliminary voir dire of jurors began and continued through April 30. Of the 150 veniremen called, twenty-six (26) were excused by agreement of counsel for sickness, hardship, etc. Fifty-nine (59) were examined individually, six of whom were excused over the objection of counsel for the petitioner on the grounds of alleged opposition to the death penalty, eighteen of whom were challenged for cause by the State and/or defense counsel, and eleven of whom were excused by the Court on the grounds of prejudicial opinions as to guilt.

The trial of the case began on May 1, 1974. Petitioner filed a "Motion for Certain Instructions to the Jury" on May 8 and the next day filed a "Second Motion for Certain Instructions to the Jury" and a "Motion to Reconsider Other Certain Requested Instructions."

The State filed its "Motion for Certain Instructions to the Jury" on May 9, 1974.

Petitioner was found guilty of two counts of aggravated murder, two specifications thereon and one count of aggravated robbery. The jury made no finding as to one charged specification.

On May 15 the trial court ordered its court-appointed Drs. German and Villalba to examine defendant in accordance with the mitigation provisions of Ohio Revised Code, Section 2929.04(B)(3).

An application for attorneys fees for Lawrence R. Smith, Esq., court appointed counsel for Samuel Howze, Jr., was filed on May 16.

Letters from Judge Barbuto to Dr. Villalba and Dr. German were filed on May 17.

While the transcript of docket and journal entries to be filed with this Court indicates that the "Prosecutor Filed R.C. Section as to Mental Deficiency as Relates to Mitigation" on May 17, this unsigned memorandum was prepared at the request of the trial court by its law clerk.

On May 22, petitioner filed a motion for a new trial, which motion was overruled on May 29. Petitioner was sentenced to death in the electric chair.

Petitioner was advised of his right to appeal; and the trial court stayed execution of sentence pending disposition of all appeals, while appointing trial counsel to prepare the appeal.

Petitioner's death sentence was finally affirmed by the Ohio Supreme Court.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

In general, the petitioner was indicted, tried, convicted and sentenced to death, and such judgment and sentence were finally affirmed by the Ohio Supreme Court, in violation of his rights under the Sixth, Eighth, Tenth and Fourteenth Amendments to the United States Constitution. These federal questions were raised, at the earliest possible time, at trial in the Court of Common Pleas of Summit County, Ohio by pleadings (motions to dismiss and strike directed to the indictment, etc.), by objections and exceptions to the evidence (during voir dire and trial), by requests to charge (especially as to lesser included offenses), and objections and exceptions thereto, and by motions, objection and exceptions to the substantive and procedural constitutionality of the mitigation hearings and evidence. These claims as to the federal questions were also raised and pressed consistently in the assignments of errors to the Court of Appeals for Summit County, Ohio and in the propositions of law proposed to the Ohio Supreme Court.

The manner in which the state courts below passed upon the federal questions is reflected in the attached opinions.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE CONSTITUTIONAL VALIDITY OF PETITIONER'S SENTENCE OF DEATH.

A.

Introduction

This capital case, involving heinous crimes for which a culturally and emotionaly deprived youth was convicted, should be reversed, because he was unconstitutionally charged, tried and convicted.

Ohio's scheme of imposition of capital punishment simply cannot stand scrutiny.

The Ohio laws plainly dictate that a convicted murderer be executed unless he proves one of three mitigating circumstances. Cf., Mullaney v. Wilbur, 421 U.S. 684 (1975).

This is not fair, just or constitutional. Id.

The Ohio laws cannot be upheld where (as here) they are susceptible to arbitrary, capricious and freakish application. Gregg v. Georgia, 96 S. Ct. 2909; Furman v. Georgia, 408 U.S. 238 (1972). The gravemen of this case is whether a human being should be put to death on the basis of his Intelligence Quotient ("I.Q.").

A cursory reading of the preceding Ohio Statutes readily discloses that the only realistic exculpation from the ultimate penalty is being an embicile, psychotic or a moron.

In short, the Ohio death penalty escapes are illusory.

B.

The Ohio Death Penalty Statutes Place Unconstitutional Limitations Upon the Consideration of Mitigating Circumstances.

Woodson v. North Carolina, 428 U.S. 280 (1976) and Roberts v.

Louisiana, 428 U.S. 325 (1976), hold that contemporary standards of decency, incorporated in the Eighth Amendment, require "particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death" and forbid "treat [ing] all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death," Woodson v. North Carolina, supra, 44 U.S.L.W. at 5274. Moreover, they acknowledge that post-Furman legislative enactments of statutes allowing automatic application of the death penalty reflect "attempts by the States to retain the death penalty in a form consistent with the Constitution," rather than "a renewed societal acceptance" of Draconian infliction of capital punishment. Id. at 5273.

Examination of the Ohio death penalty statutes and the history of their enactment establishes that they, like the statutes invalidated in Woodson and Roberts, are more rigid than contemporary standards of decency can condone, and reflective, not of the will of the people of the State of Ohio as expressed through its legislature, but of a compromise between humane policy concerns and the supposed requirements of Furman.

In the wake of Furman, 21 of the 35 states that enacted new death sentencing provisions made death the mandatory consequence of a finding that a defendant was guilty of certain criminal conduct. 1/ These states responded to the judgment of respected legal scholars that only the removal of all sentencing discretion would satisfy the Furman requirement that death sentences not be arbitrarily imposed. However, the federal government and 11 states enacted statutes following the example of the Model Penal Code Proposed Official Draft of 1962 in that they directed consideration of aggravating and mitigating circumstances in the process of determining

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1/ 11 Del. Code §§636, 4209(1); Idaho Code §§18-4003 and 4004; Ind. Ann Stat. §10-3041(b); Ky. Crim. Code, Sec. 5 76(2) and 61 (2); La. Rev. Stat. Ann. §§14:30, 14:113 and 14:44; Md. Code Ann. Art. 27, §413; Miss. Code §§97-3-65, 97-3-21 and 97-3-19(2); Vernon's Mo. Stat. Ann. §§559.009(3) and 559.05; Nev. Rev. Stat. §200-030 (5); N.H. Rev. Stat. Ann. §630:1; N.M. Stat. Ann. §40A-2-1, 40A-20-2; N.C. Gen. Stat. §§14-17 and 14-21; Okla. Stat. Tit. 21, §701.3; R.I. Gen. Laws Ann. §11-23-2; S.C. Code §16-52; Tenn. Code Ann. §§39-3702 and 39-2402; Va. Code §18.2-31; Wash. Rev. Code 9.48.030, Initiative Measure No. 316

sentence in a capital case.[2/] These twelve jurisdictions, finding the mandatory scheme too harsh, and anticipating that the United States Supreme Court would approve capital sentencing discretion if that discretion were guided by standards, chose to focus sentencing deliberations upon a broad range of mitigating factors.[3/]

2/ See, Model Penal Code §201.6 (Proposed Offical Draft, 1962).

3/ In Arizona, Georgia, Illinois, Montana and Utah, any factor deemed mitigating by the sentencing authority could be considered, and could preclude imposition of a capital sentence. Ariz. Rev. Stat. §13-454(D); Ga. Code §27-2531.1(b); Ill. Rev. Stat. ch. 38, §1005-8-1A (subsequently invalidated); Mont. Rev. Codes Ann. §94-5-105(1); Utah Code Ann. §76-5-202(1)(g). And the mitigating factors considered in the sentencing process in these twelve jursidictions invariably include, as they must, in light of the Woodson and Roberts holdings, factors having to do with "the character and record" of the defendant whose life is at stake. Woodson v. North Carolina, supra, 44 U.S.L.W. at 5274. Thus, in Alabama, Arkansas, Colorado, Connecticut, Florida, Nebraska, Utah and in Federal jurisdictions, the age of the defendant must be considered, and in Colorado and Connecticut and under Federal law a finding that the defendant was under eighteen is an absolute bar to imposition of a death sentence. Ala. H.B. 212 §7(g); Ark. Code §41-4712(d); Sec. (5)(a), Col. S.B. No. 46 (1974 sess.); Conn. Gen. Stat. §53a-45(4) (f); Fla. Stat. Ann. §921.141(7); Neb. Rev. Stat. §29-2523(2); Utah Code Ann. §76-3-207 (1)(e); 49 U.S.C. 1473(c)(6)(A). See also Cal. Penal §190.3; N.M. Stat. Ann. §40a-20-2; NY Penal Law §125.27. In all twelve jurisdictions, the prior criminal record of the defendant must be considered. Ala. H.B. 212 §§(6) (a) and (b); Ariz. Rev. Stat. §§13-454 (1) and (2); Ark. §§41-4711 (a) and (b); Sec. 4 (6) (a), Col. S.B. No. 46; Conn. Gen. Stat. §§53a-45(g) (1) and (2); Fla. Stat. Ann. §§921.141(6) (a) and (b) and (7) and (a); Ga. Code §27-2534.1(b) (1); Ill. Rev. Stat. ch. 38, 1005-8-1A(3); Mont. Rev. Codes Ann. §94-5-105(1) (b); Neb. Rev. Stat. §§29-2523(1) (a) and (2) (a); Utah Code Ann. §76-5-201(1) (a) and (g) and §76-3-207 (1) (a); 49 U.S.C. §1473 (c) (7) (B) (i) and (ii). In Alabama, Arkansas, Florida and Nebraska, a broad range of mental and emotional disturbance may be considered mitigating. Ala. H.B. 212 §7(b); Ark. Code §41-4712(a); Fla. Stat. Ann. §921.141 (7) (b); Neb. Rev. Stat. §§92-2523 (2) (b) and (c). And limitations in the capacity of the defendant to regulate or appreciate the wrongfulness of his conduct are mitigating in Alabama, Arizona, Arkansas, Connecticut, Florida and Nebraska and in Federal jurisdictions and preclude imposition of a death sentence in Colorado. Ala. H.B. 212 §7(f); Ariz. Rev. Stat. §13-454(F) (1); Ark. Code §41-4712(c); Sec. 4 (4) (b), Col. S.B. No. 46; Conn. Gen. Stat. §53a-45(f) (2); Fla. Stat. Ann §921. 141 (7) (f); Neb. Rev. Stat. §29-2523(2) (g); 49 U.S.C. §1473 (c)(6) (B).

At the time of the Furman decision, a statute containing mitigating circumstances of the kind contained in the Model Penal Code had passed the Ohio House of Representatives and was pending before the Senate Judiciary Committee. 4/ In light of Furman, the Senate Committee felt it necessary to "[r]efine the House position by retaining the death penalty, but remov[ing] from the judge and jury as much discretion as possible in the punishment determination procedure." 5/ Sentencing determinations in capital cases were therefore taken from the jury and all mitigating factors having to do with the character and background of the offender were eliminated, save one:

> "The offense was primarily the product of the offender's psychosis or mental deficiency... ."

Ohio Rev. Code §2929.04(B) (3). 6/ In view of the extreme improbability that a psychotic offender would be found criminally responsible, the utility of this circumstance as a means to open the door to consideration of the life

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4/ Lehman and Norris, Some Legislative History and Comments on Ohio's New Criminal Code. 23 CLEV. ST. L. REV. 8, 18 (1974).

5/ Id. at 20.

6/ The statute provides that the trial judge, or if trial is without a jury, a panel of judges, Ohio Rev. Code §2929.03 (c), must impose a death penalty unless the defendant convicted of aggravated murder with specifications proves one of the following factors by a preponderance of evidence:

> "(1) The victim of the offense induced or facilitated it.
>
> (2) It is unlikely that the offense would have been committed, but for the fact that the offender was under stress, coercion, of strong provocation.
>
> (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity."

Ohio Rev. Code §2929.04(B).

These pleas were submitted, and the jury returned guilty verdicts on two charges of aggravated murder and on two of three specifications. The jury also returned a guilty verdict on the armed robbery charge.

Under narrowly defined boundsof "mental deficiency" the trial court found no mitigating circumstances.

Bayless was sentenced to death in the electric chair.

STATEMENT OF THE CASE

A bill of indictment was filed on March 6, 1974, charging the petitioner with four counts of aggravated murder and three counts of aggravated robbery.

Angelo Fanelly and William R. Holland were appointed counsel for petitioner. Petitioner was first arraigned on March 11 and plead not guilty. At that time, the Court granted petitioner permission to file any necessary pleadings available to him prior to his plea. On this date, petitioner requested permission to take a polygraph examination, which the trial court granted. The prosecuting attorney then filed an application to reconsider the motion to take a polygraph.

On March 11, the trial court also ordered that trial be set for April 22 and that a special venire of seventy-five (75) names be drawn.

Again on March 11, appointed defense counsel Fanelly withdrew from this case for personal reasons, and Norman Purnell, Esq. was appointed. After more consultation with attorneys Purnell and Holland, petitioner withdrew his request for a polygraph examination.

On March 18, 1974, petitioner filed a "Motion to Dismiss the Indictment and/or Grant Appropriate Relief"; a "Motion for Change of Venue or Change of Venire" and an "Application to Take Depositions." The Court then ordered the appointment of three psychiatrists, Drs. Kern, Barton and Villalba, to examine defendant's mental condition as to his competency to stand trial.

and character of the accused turns, in practice, upon the scope of the term "mental deficiency." This term is, as a matter of general and psychiatric usage, synonomous with mental retardation, and the Supreme Court of Ohio has held that its meaning is not significantly broader in the context of §2929.04. State v. Bayless 48 Ohio St. 2d 73, 94-96, (1976).[7] Thus -- under a sentencing scheme designed "to remove ... as much discretion as possible in the punishment determination procedure,[8] -- virtually every person who is not mentally retarded and who is convicted of a capital crime becomes part of "a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death"[9] solely on the basis of the circumstances of a single criminal act and without independent consideration of any mitigating aspect of his life and character.

7/ That Court noted that:

> "[m]ental deficiency is consistently defined to mean a low or defective state of intelligence,"

id. and deemed itself:

> "...unable to find that the decision of the General Assembly to allow mitigation of sentence for those who are mentally deficient, but not of other mental disorders not constituting psychosis or amounting to insanity, falls outside the proper scope of its authority to assign responsibility and punishment for criminal offenses,"

id. Surprisingly, it has said that age is a "primary" factor going to mental deficiency, State. v. Bell, 48 Ohio St. 2d 270 (1977). But it has invariably upheld death sentences imposed against minors. State v. Bell, supra. (defendant 17 at time of arrest).

In State v. Royster, 48 Ohio St. 2d 381 (1976), it upheld, against a claim that the evidence required a finding of mental deficiency, a death sentence imposed upon a defendant who "had an I.Q. of 75 in 1962; 61 in 1966; and 54 in 1968," id. at 389.

8/ Lehman and Norris, Some Legislative History and Comments on Ohio's New Criminal Code, 23 CLEV. ST. L. REV. 8, 20-21 (1974).

9/ Woodson v. North Carolina, supra.

This Court's recognition that, under contemporary standards of morality, not " ' every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender,'" and that "' individual culpability is not always measured by the category of crime committed'" 10/ is confirmed by the record of capital legislation enacted since its pronouncement that focused, discretionary capital sentencing processes are not in necessary conflict with Eighth Amendment prohobitions. For, legislatures free of misconceptions engendered by the Furman opinions have sometimes allowed consideration of any circumstance deemed mitigating by the sentencer, and have in no case defined mitigating factors as restrictively as did the Ohio legislature.

By contrast, the Ohio legislation not only precludes, for the non-retarded, consideration of any mitigating factor not inhering in the facts of the crime, but precludes consideration of most mitigating aspects of the crime itself, allowing mercy only in the rare cases in which duress or victim inducement is present but does not constitute a defense.

10/ Roberts v. Louisiana, supra.

Ohio's appellate review system [14] cries for evaluation by this court in light of the "fundamental respect for humanity underlying the Eighth Amendment ... that requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death," Woodson v. North Carolina, supra, 428 U.S. 280 (1976).

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[14] Although the Ohio Supreme Court has said that mitigating circumstance provisions must "be liberally construed in favor of the accused," State v. Bell, 48 Ohio St. 2d 270, 281 (1976), it has also held that it "will not retry issues of fact" going to sentence determination, but will only determine "whether there is sufficient substantial evidence to support the verdict;" State v. Edwards, 49 Ohio St. 2d 31, 47 (1976) and has upheld a finding of an absence of duress or mental defiency, and the resultant death sentence, in the case of a sixteen year old accomplice of an adult triggerman where "[t]here was evidence in the psychiatric reports that...[he] was perhaps easily led by...[the triggerman]" and evidence of "an unsatisfactory home, absence of family or other supervision, drug involvement, and an inability to cope with school demands," State v. Bell, supra, 48 Ohio St. 2d at 282.

The Ohio Supreme Court has reviewed about 20 post-Furman death sentences. It has reduced none.

An intermediate Ohio Appellate court has vacated the death sentences of two co-defendants after finding:

> "that the undisputed evidence demonstrates that the victim's willingness to buy a large sum of marijuana 'facilitated' the robbery...[and that] the victim's decision to participate in such unlawful while [conspicuously] armed ... 'induced' (i.e. persuaded) the offenders ... in the use of firearms that resulted in the victim's death."

State v. Hines, Ct. of Appeals, Fifth App. Dist., Case Nos. CA-634-639. Before vacating the sentence, the court deemed it necessary to find, in addition, that

> "no basis exists (considering the nature and circumstances of the offense and the history, character and condition of ... [the offenders]) to negate the existence ... of mitigating ...."

Id. at 57.

C.

The Ohio Death Penalty Statutes Violate the Sixth, Eighth and Fourteenth Amendments in that they Deny the Capitally Accused the Right to a Judgment of his Peers as to the Existence of Mitigating Circumstances, and the Appropriateness of the Penalty of Death.

In view of the "awesome finality of a capital case, [15] American jurisdictions had, prior to the decision of the United States Supreme Court in Furman v. Georgia, 408 U.S. 238 (1972), determined with near unanimity that "infliction of the death penalty" be put in the hands of the jury, rather than the judge." [16] Indeed, "[e]xcept for four States that entirely abolished capital punishment in the middle of the last century, every American jurisdiction had at some time authorized jury sentencing in capital cases." McGautha v. California, supra, 402 U.S. at 200, n. 11.

> "The inadequacy of distinguishing between murderers solely on the basis of legislative criteria narrowing the definition of the capital offense led the States to grant juries sentencing discretion in capital cases. Tennessee in 1838, followed by Alabama in 1841, and Louisiana in 1846, were the first states to abandon mandatory death sentences in favor of discretionary death penalty statutes. This flexibility remedied the harshness of mandatory statutes by permitting the jury to resond to mitigating factors by withholding the death penalty. By the turn of the century, 23 states and the Federal Government had made death sentences discretionary for first-degree murder and other capital offenses. During the next two decades 14 additional states replaced their mandatory death penalty statutes. Thus, by the end of World War I, all but eight states, Hawaii, and the District of Columbia either had adopted discretionary death penalty schemes or abolished the death penalty altogether. By 1973, all of

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15 / McElroy v. United States, 361 U.S. 249, 255 (1960) (dissenting and concurring opinion of Mr. Justice Harlan).

16 / Ibid.

these remaining jurisdictions had replaced their automatic death penalty statutes with discretionary jury 17/ sentencing." 18/

In Ohio, the shift to jury discretion in capital sentencing came in 1898, 19/ and the system prevailed without interruption until the death penalty statutes of that state were invalidated in 1972. There is no doubt that the subsequent determination to strip the jury of its control over the use of the death penalty reflects the desire of the Legislature to "retain the death penalty in a form consistent with the [Federal] constitution" 20/ rather than a willing abandonment of the principle that the momentus decision to take or spare the life of a criminal defendant can only be made by a jury of his peers. For the new Ohio Criminal Code as drafted before the decision of this Court in Furman v. Georgia clearly provided for jury sentencing in capital cases. 21/ But, faced with the Furman ruling that unbridled jury discretion to impose a death sentence was constitutionally prohibited and the opinion expressed in McGautha that the

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17 / In 1965, the State of Colorado placed discretionary authority to determine sentence in capital murder sentences solely in the hands of the trial judge. It was the only jurisdiction to do so after the national shift to jury discretion or abolition and before Furman. BOWERS, EXECUTIONS IN AMERICA 8 (1974).

18 / Woodson v. North Carolina, supra.

19 / BOWERS EXECUTIONS IN AMERICA 8 (1974).

20 / Woodson v. North Carolina, supra.

21 / Lehman & Norris, Some Legislative History and Comments on Ohio's New Criminal Code, 23 CLEV. ST. L. REV. 8, 16-17 (1974).

formulation of standards to guide juries in the capital sentencing process was impossible, the Ohio legislature undoubtedly thought it necessary to make capital sentencing a matter for judicial determination. [22]

It is now conceded that "McGautha's assumption that it is not possible to devise standards to guide and regularize jury sentencing in capital cases has been undermined by subsequent experience," Gregg v. Georgia, supra. This court has reaffirmed [23] the desirability of jury input in the capital sentencing process, Id. Proffitt v. Florida, supra, and struck down the death penalty laws of three states for their failure to provide a "meaningful opportunity for consideration of mitigating factors presented by the circumstances of the particular crime or by the attributes of the individual offender." Roberts v. Louisiana, supra. And, while this Court has "never suggested that jury sentencing is constitutionally required," Proffitt v. Florida, supra, it has neither considered or approved a post-Furman death penalty statute which excluded the jury from the process of determining sentence. [24] Indeed, in upholding the Florida, post-Furman

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22/ Id. at 20.

23/ See, Witherspoon v. Illinois, 391 U.S. 510, 390, 391 n. 15, McGautha v. California, supra, at 200 n. 11, 211.

24/ The Court's speculation that "judicial sentencing would lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases," must, of course, be taken in the context in which it was issued — as a statement of the probable result of a system in which an advisory jury sentence may be mitigated at the discretion of the trial judge and may only be increased where a life sentence would be clearly unreasonable. Even so, it seems to ignore the well documented fact that sentencing attitudes and practices differ widely among

death penalty statute, this Court has approved only the most limited encroachment upon the tradition that only a jury may impose a sentence of death.

> "The jury's [sentencing] verdict is determined by majority vote. It is only advisory; the actual sentence is determined by the trial judge. The Florida Supreme Court has stated, however, that '[i]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.'"

Proffitt v. Florida, supra.

Although it may be permissible — and desirable — to permit trial judges to reduce death sentences imposed uner the influence of passion or prejudice or against the weight of aggravating and mitigating evidence, the imposition of a death penalty under a procedure which affords no opportunity for meaningful jury input -- a practice introduced to contemporary jurisprudence as a result of confusion engendered by Furman and McGautha — encroaches three independent constitutional principles, and, therefore merits review by this Court.

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24 / Continued

judges, see, e.g. Zumwatt, The Anarchy of Sentencing in the Federal Courts, 57 J. AM. JUD. SOC. 96 (1973); HOGARTH, SENTENCING AS A HUMAN PROCESS (1971). The capriciousness of having life or death turn upon the disposition of the judge by whom a particular case is decided is manifest. Moreover, detailed, scientific review has revealed no greater consistency in judicial, capital sentencing, although juries were found to be slightly more lenient. KALVEN & ZEISEL, THE AMERICAN JURY, 437-44 (1966).

1. The Principle that Death Sentences may only be imposed by a Jury is Fundamental to our Jurisprudence and an Essential Assurance Against Disproportionality and Excessiveness in Capital Sentencing.

"The magnitude of a decision to take a human life is probably unparalleled in the human experience of a member of civilized society." Marion v. Beto, 434 F. 2d 29, 32 (C.A. 5, 1970). We have traced a history which strongly suggests that jury participation in such a decision represents a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," Snyder v. Massachusetts, 291 U.S. 97, 104 (1934). 25/

Although the legislative trend away from judicial imposition of the death penalty was in part a response to the problem of jury nullification, it was mandated by the enormity of the issue in the context of contemporary standards of morality, McElroy v. United States, supra, 361 U.S. at 255. Legislators across the nation determined, as did Congress, to "take from the judge the onus of inflicting capital punishment," United States v. Jackson, 390 U.S. 570, 576, n. 12, because, in the matter of life and death, as in matters of fact going to the question of guilt or innocence,

> "If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it."

Duncan v. Louisiana, 391 U.S. 145, 156 (1968). The capital defendant was thereby assured that his fate might be determined by a body representative

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25/ See, Bloom v. Illinois, 391 U.S. 194, 202-07 (1968) in which the Court relied upon a comparable historic pattern to impose constitutional limitations upon "the power of judges to try contempts," id. at 207.

of the full range of social strata and interests rather than by a judge who is trained and bound to uphold the law and may well give less weight to mitigating evidence out of a reluctance to deprive the citizenry of any protection or retribution. Since Judges do impose the death penalty "somewhat more often" than do juries, KALVEN AND ZEISEL, THE AMERICAN JURY 435 (1966), this right can be, in any given case, the right to life.

> "[A]mong the leading authorities in penal science, the supporters of abolition appreciably outnumber those who favour the retention of capital punishment. The specialists of the social sciences, criminologists, sociologists. The supporters of capital punishment, apart from a number of political figures and persons holding high public office, are generally jurists with a traditional training and judges."

UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, CAPITAL PUNISHMENT (ST/SOA/SD/9-10) (1968) at 64. See also KOESTLER, REFLECTIONS ON HANGING (Amer. ed. 1957) at 21-40.

Moreover, the policy of placing the decision to take or spare life in the hands of the representatives of the people whom the law stands to protect, and whose retributive sentiments the law serves to counsel, serves "to maintain a link between contemporary community values and the penal system -- a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" Witherspoon v. Illinois, supra, 391 U.S. 510, 520 n. 15. When life is at stake, jury sentencing "'places the real direction of society in the hands of the governed ... and not in ... the government,'" Powell, Jury Trial of Crimes, 23 WASH. & LEE L. REV. 1, 5, citing 1 DE TOCHQUEVILLE, DEMOCRACY IN AMERICA 282 (Reeve Transl. 1948) (1966).

Jury determinations are one of "the two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society." Woodson v. North Carolina, supra, [26] At a time when society has rejected "the belief that 'every offense in a like legal category calls for an idential punishment without regard to the past life on habits of a particular offender, '" [27] it is the only precise indicator of those standards. For, while it is possible that over the years patterns of jury nullification and legislative enactment may reveal popular revulsion against imposition of the death penalty in subtle categories of cases, the Eight Amendment surely forbids the execution of defendants whom juries might have spared had the will of the people been made directly known through jury sentencing. The unnecessary institutionalization of a sentencing system which thwarts the merciful sentiments of the people while these subtle distinctions are identified and acted upon by courts and legislatures can only result in unnecessary and unpopular use of the most drastic sanction which the government can impose upon its citizens.

> "In our criminal courts the jury sits as the representative of the community; its voice is that of the society against which the crime was commited." [28]

That voice must be heard on the question whether life is to be taken in its behalf.

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26 / "The jury ... is a significant and reliable objective index of contemporary values because it is so directly involved." Gregg v. Georgia, supra.

27 / Roberts v. Louisiana, supra, 428 U.S. at _____.

28 / Williams v. New York, 337 U.S. 241, 253 (1949) (dissenting opinion of Justice Murphy).

2. The Failure to Provide for Jury Input in the Capital Sentencing Process will result in Impermissably Arbitrary Imposition or the Penalty of Death.

Mandatory death penalty provisions, which "withdr[ew] all sentencing discretion from juries in capital cases," failed "to provide a constitutionally tolerable response to Furman's rejection of unbridled jury discretion in the imposition of capital sentences," Woodson v. North Carolina, supra. This is because, in view of the fact "that American juries have persistently refused to convict a significant portion of persons charged with first-degree murder of that offense under mandatory death penalty statutes ... it is only reasonble to assume that many juries under mandatory statutes will continue to consider the grave consequences of a conviction in reaching a verdict ...

> Instead of rationalizing the sentencing process, a mandatory scheme may well exacerbate the problem identified in Furman by resting the penalty determination on the particular jury's willingness to act lawlessly."

Ibid. This argument is equally compelling where aggravating circumstances are built into the definitions of capital crimes, Roberts v. Louisiana, supra, so long as the punishment determination is out of the hands of the jury, it is no less compelling where a death sentence may be imposed upon a judicial finding of the absence of mitigating factors. For,

> "... there is a point at which the wide-spread imposition of drastically severe penalties arouses in ordinary men a sympathy for those accused of crime which leads them to refuse to participate in their infliction, as complainants, as witnesses, as jurors, and even as officials. When this result occurs, nullification ensues and the effect of severity of threatened punishment is greatly to increase its actual uncertainty as well as to provide a general hatred of the law which must culminate ultimately in its change."

Michael & Wechsler, A Rationale of the Law of Homicide II, 37 COLUM. L. REV. 1261, 1265 (1937). And

> "If the matter is consigned to the discretion of some other administrator, such as the judge, the danger of nullification by the jury remains, though it may be smaller than if an offensive penalty is legislatively prescribed. Whether or not that is so will depend upon the jury's guess as to what the judge is likely to do in the event of conviction."

Id. at 1267, n. 19. The addition of a new uncertainty in the processes of trial, appeal and executive review of death sentences can not minimize the incidence of nullification sufficiently to meet the concerns articulated in Furman, Woodson and Roberts.

3. Findings Regarding the Presence or Absence of Mitigating Circumstances are Findings of Fact as to which a Defendant has a Sixth Amendment Right to a Trial by Jury.

The determination made by judges pursuant to §2929.04(B), is a substantially different determination than that typically made by judges in the process of criminal sentencing. For, as we have pointed out above, there can be no weighing of aggravating and mitigating circumstances, no consideration of whether the defendant before the court may or may not be rehabilitated, [29/] no independent evaluation of "the character and record of the individual offender," Roberts v. Louisiana. The §2929.04(B) proceeding consists of three factual determinations of the kind that juries

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29/ Compare, Vernon's Tex. Code of Crim. Proc., Art. 37.071.

were designed to make, have traditionally made, and must, if the right to trial by jury is to be safeguarded, be permitted to make. The determinations whether "the victim of the offense induced or facilitated it," and whether "it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation" are indistinguishable in kind from the determination that the defendant was "under extreme emotional stress brought on by serious provocation reasonably sufficient to incite him into using deadly force" and thus guilty of the lesser offense of voluntary manslaughter. 30/ And the determination whether "the offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity" is surely no different in kind than the determination whether the defense of insanity was in fact established.

A factual determination which separates those who will live and those who will die by the hand of the state is a determination so significant that the prodecural safeguards surrounding its adjudication may not depend upon the form in which the distinction is articulated, for "the criminal law ... is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability," Mullaney v. Wilbur, 321 U.S. 684 (1975). In drawing a distinction between "those who kill in the heat of passion and those who kill in the absence of ... [that] factor" without requiring that the prosecution prove the absence of

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30 / Ohio Rev. Code Ann. §2903.03

overriding passion beyond a reasonable doubt, the State of Maine impermissably denigrated the principle that criminal conviction may only be obtained by proof beyond a reasonable doubt of every element of the alleged crime." Id. at 698. Since the State of Ohio has drawn a distinction between those who kill under statutorily defined mitigating circumstances -- two of which bear remarkable similarity to the determination at issue in Mullaney -- and those who kill in the absence of such circumstances, and has determined that the death penalty is only applicable in the latter category of cases, it cannot constitutionally evade the equally important principle that the criminal defendant is entitled to a judgment of his peers as to facts that significantly affect the degree of his culpability. This is not to say that all factors affecting criminal sentencing determinations must be decided by a jury, 31/ but Mullaney stands for the proposition that where the determination of certain factors is of crucial significance -- where it "may be of greater importance than the difference between guilt or innocence for many lesser crimes" -- the state may not lessen the standards by which those factors must be proved by "characterizing them as factors that bear solely on the extent of punishment." Ibid. Surely, the distinction between crimes punishable by death and those punishable by life imprisonment is of crucial significance. For "the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, it is finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." Woodson v. North Carolina, supra.

31/ See note 33, infra.

Judge Friendly held in United States v. Kramer, 289 F. 2d 909 (C.A. 2, 1961) that where an aggravating circumstance is not "an element of the crime but rather a fact going only to the degree of punishment," and where the presence of the aggravating circumstance substantially increases the severity of possible sentencing consequences, [32] it must be assumed that "the Sixth Amendment entitles a defendant to have that fact determined by the jury rather than by the sentencing judge. [33] Id. at 912. [34] This principle is no less valid in the case of mitigating factors of identical import.

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32 / The aggravating circumstance involved in Kramer (the fact that embezzled commercial paper exceed $100 in value) increased the crime from a misdemeanor to a felony. Id. at 920.

33 / The District of Columbia Circuit has held to the contrary regarding the relatively straighforward question of whether the defendant has been convicted triggers the operation of recidivist provisions. Jackson v. United States, 221 F. 2d 883 (C.A.D.C., 1955); Anderson v. United States, 326 A. 2d 807 (C.A.D.C., 1974); but see, United States v. Bolden, 514 F. 2d 1301 (C.A.D.C., 1975). We do not challenge the reasoning of these cases insofar as they relate to the right to have a jury perform the essentially ministerial function of determining whether a defendant has been convicted of prior felonies. But the complex, judgmental questions articulated by §2929.04(B) separate those who may live and those who may die. In such a determination the right to a jury may not be denied.

34 / The Kramer principle "is now well recognized." United States v. DeVall, 462 F. 2d 137, 142 (C.A. 5, 1972). See, JURY INSTRUCTIONS IN FEDERAL CRIMINAL CASES, §20.04, cited in United States v. Ditata, 469 F. 2d 1270, 1273, n. 3 (C.A. 7, 1973):

> "The Government must prove the value of the property stolen because the law provides a greater penalty if the value of the property exceeds $100. ... The value of the property stolen is a question of fact to be determined by the jury."

D.

Ohio Capital Sentencing Procedures Impermissably Penalize Exercise of the Right to Trial by Jury.

United States v. Jackson, 390 U.S. 570 (1968) stands for the proposition that the right to a jury trial is unconstitutionally diminished when separate and more lenient sentencing standards are established for cases in which the right is waived. See also, Funicello v. New Jersey, 403 U.S. 948 (1911) (per curiam); Atkinson v. North Carolina, 403 U.S. 948 (1971) (per curiam). This is so because such a scheme "needlessly encourages" the waiver of the right to have one's guilt determined by a jury. Id. at 583. Yet, under Ohio capital sentencing procedures the defendant who elects to be tried by a jury must forego the benefit of having his fate determined by a panel of judges rather than by a single judge. This benefit is, of course, considerable:

> "A multi-judge court offers an opportunity for disagreement wholly lacking in a single judge. With such an issue as the death penalty involved, the possibility and availability of disagreement are advantages that cannot be disregarded. The fact that a single judge may be reluctant to assume the awesome solitary choice between life and death cannot weigh in the balance. Judges are presumed to have the fortitude to carry out their responsibilities."

Rainsburger v. Foglaine, 380 F. 2d 783, 785 (C.A. 9, 1967). And, since there is no justification for conferring the benefit upon some, but not all capital defendants, it can not legitimately serve as an inducement to forego trial by a jury of one's peers.

E.

Ohio Capital Sentencing Procedures Impermissibly Shift to the Defendant Convicted of Aggravated Murder with Specifications the Burden of Proving Facts which Distinguish Those Who May Live and Those Who Must Die.

The existence of mitigating factors, under Ohio Law, must be established by the defendant and by a preponderance of the evidence. Ohio

Rev. Code Ann. §2929.04(B) (1974). State v. Royster, supra, 48 Ohio St. 2d at 389.

As previously discussed, the nature of the inquiry conducted at the mitigation phase of an Ohio capital trial and established that it is a proceeding at which narrow factual determinations are made about the psychological makeup of the defendant and the precise nature of his crime. We have pointed out that it is upon the basis of these factual determinations that defendants are categorized as being punishable by life imprisonment or condemned to die at the hand of the State. If a distinction of this kind is to be drawn, the State must "require the prosecution to establish beyond a reasonable doubt the fact[s] upon which it turns, "Mullaney v. Wilbur, supra.

> "'[t]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."

Gardner v. Florida, citing Woodson v. North Carolina, supra, (concurring opinion of Mr. Justice White) (Emphasis by Mr. Justice White). It follows that Strict adherence to the Due Process requirements set forth in Mullaney is compelled in the context of a mitigation hearing of the kind which the State of Ohio has devised, for

> "There is always in litigation a margin of error in fact-finding, which both parties must take into account. Where one party has at stake an interest of transcending value ... this margin of error is reduced as to him by the process of placing on the other party the burden [of proof] ... beyond a reasonable doubt."

Speiser v. Randall, 357 U.S. 513, 525-526 (1958).

It can not be denied that the capital defendant "has at stake an interest of transcending value." And it can not be contended that the capital defendant is comparably protected by the concession that proof of the facts that would spare his life need only be "established by a preponderance of the evidence," Ohio Rev. Code Ann. §2929.04(B) (1974). For, by that standard he must die even if it is as likely as not that he is, by the calculus of the statute, deserving of mercy.

In view of the gravity of the sentence, and in view of the need of courts and legislatures across the nation to know more precisely what the Eighth Amendment requires of "the procedure employed by the State to select persons for the unique andirreversible penalty of death," [35] it is incumbent upon this Court to consider the rigidity of Ohio capital sentencing process, its isolation from "the conscience of the community," [36] its chilling effect upon the right to trial by jury; its allocation of the burden of proving facts mandating execution and the combined prejudicial effect of these factors upon the defendant accused of a capital crime. In view of the obvious cruelty of the sentence, Furman v. Georgia, supra, (concurring opinion of Mr. Justice White,) it is incumbent upon this Court to consider whether it may be imposed upon one whose capability does not exceed that of this petitioner.

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35 / Gregg v. Georgia, supra,

36 / Id.

II. PETITIONER SHOULD NOT BE PUT TO DEATH WITHOUT THE VOTE OF THE PEOPLE OF OHIO.

The Eighth Amendment to the Constitution of the United States forbids "cruel and unusual punishments."

The Tenth Amendment to the Constitution of the United States guarantees that:

"The powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States, or to the people." (Emphasis supplied.)

The people should exercise the power as to whether petitioner should die.

If not by plebescite, at least, a jury of the people should decide his fate.

See, propositions I.C. through E., supra.

III. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER PETITIONER'S RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WAS DENIED BY THE TRIAL COURT'S REFUSAL TO GRANT HIS CHANGE OF VENUE MOTION MADE ON GROUNDS OF PREJUDICIAL PRE-TRIAL PUBLICITY.

The Ohio Supreme Court held that there was "no abuse of discretion in the denial of the defense's motion for a change of venue." State v. Bayless, 48 Ohio St. 2d 73, 99 (1976).

Petitioner submits that the trial of his case, over objections as to the propriety of the local forum, clearly violated and substantially prejudiced his rights to a fair trial and due process of law. See, U.S. CONST., amends. VI and XIV.

Petitioner contends that the trial court committed prejudicial error in denying the defense motion for a change of venue.

It is an established constitutional right that where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the trial judge should either continue the case until that threat abates, or transfer the case to another county not so permeated with publicity.

Sheppard v. Maxwell, 384 U.S. 333, 35 Ohio Ops. 2d 431 (1966) and Groppi v. Wisconsin, 400 U.S. 505 (1971). See also, State v. Fairbanks, 32 Ohio St. 2d 64, 61 Ohio Ops. 2d 241, 243-244 (1972).

Petitioner made numerous motions requesting a change of venue and, alternatively, requested a continuance of the trial. See, Tr. I at 33-41 and Tr. VI at 1397-1406. See also, Defendant's Motion for Change of Venue or Change of Venire filed March 18, 1974, and Defendant's Motion for Extension of Time for Trial filed April 15, 1974. The mandated protections of Sheppard were not afforded this appellant.

A defendant is not required to establish any specifically identifiable prejudice flowing from extensive pretrial publicity. Sheppard v. Maxwell, supra and State v. Fairbanks, supra. Petitioner was required to show, and carried "the burden of showing essential unfairness [of the local forum] as a demonstrable reality." Adams v. United States ex rel McCann, 317 U.S. 269, 281 (1942). Petitioner demonstrated that "there has been prejudicial publicity requiring action by the Court." Wansley v. Slayton, 487 F. 2d 90, 92 (C.A. 4 1973). After he made this showing, the trial court was compelled by Sheppard and Fairbanks holdings to either change venue or grant a continuance. Neither procedure was followed.

Petitioner recognizes that ordinarily a change of venue rests largely with the sound discretion of the trial court. E.g., State v. Laskey, 113 Ohio App. 2d 91, 42 Ohio Ops. 2d 206, aff'd, 21 Ohio St. 2d 187, 50 Ohio Ops. 2d 432 (1970). Such a motion is often properly denied; for example, where a single newspaper article and several radio broadcasts, two days after defendant's arrest, are factual, noninflamatory, and without distortion. State v. Fairbanks, supra.

But the motion for change of venue was improperly denied in this case, one in which numerous newspaper articles and television and radio broadcasts permeated Summit County. The news coverage clearly created "a reasonable likelihood that the defendant will not receive a fair and

impartial trial." Sheppard v. Maxwell, supra and State v. Fairbanks, supra.

A few examples from the record support the defendant's conclusion that the accumulation of the publicity in this case "their very mass, their repetition over the months of trial, ridiculed the guarantee this court made to him that he would receive a fair trial before an impartial jury ..." Forsythe v. State, 12 Ohio Misc. 99, 41 Ohio Ops. 2d 104, 105 (C.P. Allen Cty. 1967).

The Akron Beacon Journal, a newspaper having a total circulation of approximately 173,097 daily and 210,191 Sunday, highly circulated in Summit County, carried the following articles among others:

2/27/74	SUSPECT SEIZED IN SLAYINGS OF FUNERAL DIRECTOR, WIFE
2/27/74	SISTER SLEPT THROUGH ARREST
2/27/74	FALLS WOMAN BELIEVES BAYLESS WAS HER ABDUCTOR
2/27/74	YOUTH GUILTY OF '70 KILLING
2/28/74	MEANS' WIDOW: 'OH, MY GOD — THIS IS HORRIBLE'
2/28/74	HOW SUSPECT GOT BACK ON THE STREETS
2/28/74	'I HOPE TO BE DEAD TOMORROW' —- BAYLESS
2/28/74	GABALAC WILL PRESS 'CHAIR' FOR BAYLESS
3/1/74	A QUESTIONS TO HAUNT US: HOW COULD THIS HAPPEN?
3/1/74	BAYLESS WAS IN COURT WHILE STILL A FUGITIVE
3/1/74	GILLIGAN: THE SYSTEM DIDN'T FAIL
3/2/74	BAYLESS WAS 18 BEFORE SLAYINGS
3/2/74	PROSECUTOR: RESTRICT PRISONER INTERVIEWS
3/4/74	SYSTEM CODDLES CRIME
3/6/74	AKRON POLICE ASK CHANGE IN YOUTH WARRANTS
3/7/74	BAYLESS INDICTED IN ANTHONY DEATHS
3/8/74	ANTHONYS 'LIVED THEIR CHRISTIANITY'
3/11/74	ANTHONY CHILDREN FUND REACHES $3,000
3/11/74	BAYLESS: 'I'M NOT GUILTY'

3/11/74 BAYLESS BEING ARRAIGNED

3/12/74 BAYLESS PLEADS: 'I'M NOT GUILTY'
(The trial court reportedly personally called the Beacon Journal to inform it it of case developments.)

3/18/74 LIE DETECTOR TEST FOR BAYLESS OUT?

3/18/74 BAYLESS BLAMES ANOTHER MAN

3/18/74 BAYLESS THREATENED FOR CUTS

3/19/74 HOWZE DENIES BAYLESS ACCUSATION IN SLAYINGS

3/19/74 INDICTED IN BURGLARLY (Howze)

3/21/74 TRIAL FIGURES WARNED AGAIN

3/27/74 THE JUDGE RATES A BOW

3/27/74 LET'S TIGHTEN THINGS UP

3/28/74 K-MART SECURITY BOLSTERED

4/1/74 CONFERENCE ON LEGAL POINTS SCHEDULED IN BAYLESS CASE

4/3/74 HOWZE PLEADS INNOCENT TO BURGLARLY CHARGE

4/5/74 YOUTH COMMISSION DIRECTOR RESIGNS

4/11/74 BAYLESS LAWYERS GET 2ND COURT OK TO QUIZ HOWZE

4/11/74 BAYLESS FILES CIVIL SUIT

4/15/74 DOUBT IS CAST ON CORRECTIONS STANDARDS

4/17/74 BAYLESS TO STAND TRIAL ON FELONY MURDER COUNTS

4/18/74 CIVIL SUIT FILED IN BAYLESS CASE

4/18/74 MRS. BAYLESS: DIDN'T ASK TO LEAVE DURING SEARCH

4/19/74 JUDGE WON'T BAR EVIDENCE, STATEMENT IN BAYLESS CASE

4/20/74 BJ CLIPPINGS ARE SUBPOENED

4/22/74 BAYLESS JURY SELECTION BEGINS: REPORTER QUESTIONED
(Wherein the trial court reportedly personally informed the Beacon Journal, prior to informing counsel, of the procedure to be utilized on voir dire.)

4/23/74 5 JURORS SEATED IN BAYLESS CASE

4/24/74 8 MORE SELECTED FOR BAYLESS JURY

The record also reveals similar Cleveland Plain Dealer articles and reports by other media.*

Additionally, it is a relevant constitutional consideration that adverse publicity concerning a criminal defendant emanates from state officials. United States ex rel Bloeth v. Denno, 313 F. 2d 364 (2nd Cir. 1963).

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*See e.g., Cleveland Plain Dealer 4/23/74, MURDER TRIAL STARTS IN AKRON: 4/24/74, JURY SELECTION FOR BAYLESS RESUMED; 4/30/74, JURORS PICKED IN BAYLESS TRIAL; 5/1/74, JURY IS SELECTED IN AKRON FOR MURDER TRIAL OF BAYLESS; 5/2/74, BAYLESS DROVE SLAIN COUPLE'S CAR, WITNESS SAYS; 5/4/74, FATAL BULLETS MATCHED TO GUN BAYLESS HAD, EXPERT TESTIFIES; 5/29/74, JUDGE WEIGHS LIFE OR DEATH FOR BAYLESS; 5/30/74, BAYLESS SENTENCED TO DIE IN CHAIR; LAWYERS APPEAL; and finally, 5/30/74, LUCASVILLE DELAYS ELECTRIC CHAIR HOOKUP. See also, numerous cartons of tapes and scripts from television and radio stations.

As the testimony of an Akron Beacon Journal newspaper reporter indicated, the trial judge himself called the media and created some of the publicity in this case.

Q. Let's go on. There's one March 11, Page A-1, I do believe.

A. I have it.

Q. In there, there is a statement indicating that Judge Barbuto called the Beacon Journal. Do you see that particular part of it?

A. I do.

Q. And did you write the article in hand?

A. Yes.

Q. I will ask Mr. Montague, is that article accurately quoted?

A. Yes, it is.

Q. You know of your own knowledge the Judge did call the Beacon Journal, is that correct?

A. That's correct.

Q. Would you go to the April 20th article?

A. (Nods head.)

Q. Did you write that article?

A. Yes, I did.

Q. Would you read the portion of the article that I pointed out to you?

A. It begins, "Barbuto told the Beacon Journal Friday he will order the Prosecution and Defense to restrict initial questioning of prospective jurors to the issues of capital punishment and pre-trial publicity."

Q. That is a correct statement by the Court?

A. It's paraphrase of what he told me, yes.

Q. Do you recall specifically the exact words?

A. No, I don't. I'd have to refer to my notes.

[Tr. II at 278-282]

Such conduct by the trial court was in sharp contravention of that court's expressed concern of control over the attorneys. See Tr. I at 6-7.

The prosecutor's public comments also generated publicity in this case. See Akron Beacon Journal, February 26, 1974 "GABALAC WILL PRESS 'CHAIR' FOR BAYLESS" and Tr. VI at 1402-1403.

Nevertheless the trial court refused to change venue, in spite of the massive publicity and the manner of some of its creation.

The trial court chose to postpone ruling upon the defendant's motion for a change of venue until after an attempt to impanel a jury. This procedure is not without some support. State v. Sheppard, 165 Ohio St. 293, 59 Ohio Ops. 398 (1956), rev'd., 384 U.S. 333 (1966). See Tr. I at 23A. But this procedure naturally would make the trial court reluctant to change venue, especially after expending the time to examine nearly one hundred veniremen.

Indeed the trial court's comments in another of its criminal cases cast some doubt on whether serious consideration was ever given appellant's motion to change venue.

> COURT: Well, Mr. Kristoff, if you have that name, if you know who he is, then give it to him.
>
> MR. KRISTOFF: Only too happy to. I will search the file diligently.
>
> COURT: Give it to him before you leave the courtroom this morning, if you have it in your file. If you do not, Mr. Thompson you will have to get it yourself somehow. All I can say, set it down for trial immediately after this trial of Carl L. Bayless, within the next two weeks, I suppose.
>
> MR. THOMPSON: Thank you.
>
> [State v. Vara, C.P. Summit County No. 73-3-225, April 29, 1974 (Barbuto, J.)]

This exchange occurred in the unrelated Vara case on Monday, April 29, in the trial court. At this time the voir dire of potential jurors for the Bayless case had not yet been completed. A motion for change of venue was, at least arguably, under consideration. Nevertheless, the trial court "set [the above captioned case] down for trial immediately after this trial of Carl L. Bayless within the next two weeks ..." [Emphasis added]

The next day, April 30, defense counsel's argument for change of venue fell on deaf ears and the trial court formally overruled the motion to change venue. Tr. VI at 1397-1406.

Even if the trial court was properly waiting to determine the validity of petitioner's motion to change venue until after the complete voir dire examination, the results of that examination alone should have compelled a change of venue.

In the instant case at least eleven (11) veniremen were excused because pre-trial publicity helped them to form an opinion as to guilt or innocence.[1] The trial court itself noted "at least 8 and possibly 9 were excused for that very reason [prejudicial publicity.]" Tr. VI at 1406. Indeed, even some of the jurors actually seated in the case expressed an awareness of the facts of this case.*

1

See Tr. II at 390-419; Tr. III at 763-785; Tr. IV at 820-840, 863-868, 885-902, 1030-1042; Tr. V at 1097-1109, 1158-1160 and Tr. VI at 1347-1366, 1385-1396.

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Tr. II at 353-368, 419-441, 441-458; Tr. III at 599-618, 657-677, 694-711, 721-740; Tr. IV at 912-935; Tr. V at 1043-1067, 1187-1208, 1208-1234, 1234-1246; Tr. XI at 2624.

The publicity concerning petitioner and the crimes with which he was charged was intense in Summit County. It is reasonable to assume that in other parts of the State the coverage of the crimes was not as unfavorable to him. For example, newspaper coverage of this case in the southern counties was almost nonexistent.

Newspaper stories and public interest in Summit County regarding this case moved beyond merely the "facts" of the case. The "Bayless" case served as an "example" of an alleged "failure" of the State's correctional procedure.

This Court has declared that no defendant should be punished for a crime without "a charge fairly made and fairly tried, in a public tribunal free of prejudice, passion [and] excitement." Chambers v. Florida, 309 U.S. 277 at 236-37 (1940) [Emphasis added].

The jury's verdict must be "based on evidence received in open court, not from outside sources." Sheppard v. Maxwell, supra, 384 U.S. at 351. See also, Groppi v. Wisconsin, supra.

Notwithstanding these plain constitutional commands, the trial court rejected petitioner's claim that he could not receive a fair and impartial trial in Summit County. Tr. VI at 1405-06.

Petitioner submits that the trial court's singular reliance on the jurors' oaths was inappropriate to determine when the Fourteenth Amendment requires a change of venue or continuance. Compare, Sheppard v. Maxwell, supra, and State v. Fairbanks, supra, with Tr. VI at 1405-1406.

Petitioner clearly made a convincing showing that Summit County was inflamed against him by prejudical publicity. The voluminous amount of documentation of this publicity alone indicates a "reasonable likelihood that prejudicial news prior to trial [would] prevent a fair trial." Sheppard v. Maxwell, supra. Petitioner does not suggest that publicity per se mandates a change of venue; he does urge that in the face of this

massive body of publicity there was a "reasonable likelihood" that publicity would prevent a fair trial. A showing of identifiable prejudice from such publicity simply is not necessary. State v. Fairbanks, supra and Forsythe v. State, supra.

The extent of pre-trial juror knowledge in this case, and the resulting excusals because of such knowledge, add to the proposition that a "reasonable likelihood" existed that the publicity would impair defendant's right to a fair and impartial trial.

Early in this litigation, the alternative procedural mandates of Sheppard v. Maxwell, supra, were pointed out to the trial court. See Tr. IA at 1-4. The trial court failed to follow either of these procedures. The obvious prejudicial effect of pre-trial publicity and the results of impanelling a jury in Summit County were prejudically disregarded.

Denial of petitioner's motion for change of venue violated his "right .... to ... a fair trial by a panel of impartial, 'indifferent' jurors", guaranteed him by the Sixth and Fourteen Amendments. Sheppard v. Maxwell, supra; State v. Fairbanks, supra; Estes v. Texas, 381 U.S. 532 (1965); Beck v. Washington, 369 U.S. 541 (1963); Irvin v. Dowd, 366 U.S. 717, 722 (1961); Chambers v. Florida, supra at 236-37 (1940).

The trial court clearly committed substantial and prejudicial constitutional error in denying petitioner's motions for change of venue or for a continuance.

IV. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE EXCLUSION FOR CAUSE OF EIGHT VENIREMEN ON THE GROUNDS OF THEIR EXPRESSED ATTITUDES TOWARD THE DEATH PENALTY VIOLATED PETITIONER'S RIGHTS UNDER THE SIXTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The record below presents important issues concerning the constitutionality of excluding persons who oppose capital punishment from service on trial juries in Ohio capital cases. The Supreme Court of Ohio held that exclusion for cause of eight veniremen here was not prejudicial or

unconstitutional under this Court's holding in Witherspoon v. Illinois, 391 U.S. 510 (1968), observing that "At best, however, this passage [391 U.S. at 522-23, n.21] is dictum as applied to a statutory scheme, such as Ohio's, which does not permit the jury to consider sentencing. "48 Ohio St. 2d at 91-92. That holding presents issues of general significance, which should be determined by this Court.

Notwithstanding the clear mandates of Witherspoon v. Illinois, 391 U.S. 510 (1968), as recently reaffirmed in Davis v. Georgia, 97 S. Ct. 399 (1976) the trial court upheld the exclusion of eight veniremen on the ground that they were opposed to capital punishment.[37]

Witherspoon held that "[i]f the voir dire testimony in a given case indicates that veniremen were excluded on any broader basis than [that outlined in Witherspoon] ..., the death sentence cannot be carried out." 391 U.S. at 522 n. 21 [emphasis added]. See also, Maxwell v. Bishop, 398 U.S. 262, 266 (1969) and Boulden v. Holman, 394 U.S. 478, 482 (1968).

The Witherspoon-Davis rationale must be given full effect under Ohio's new criminal code.

37/ See Tr. II at 310-314; Tr. III at 713-717 and 717-721; Tr. IV at 903-911; Tr. V at 1145-1153 and Tr. VI at 1301-1313. The trial court granted defendant a standing objection to the propriety of this inquiry and removal. See Tr. II at 311-313.

The proper application of the Witherspoon rules to the present case commands that petitioner's death sentence not be carried out.

Witherspoon firmly established this requirement, applicable to all cases in which a defendant potentially faces a sentence of death.

> "[A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected."
> 391 U.S. at 522-523.

The number or veniremen wrongfully excluded on account of scruples against the death penalty is irrelevant:

> "The magnitude of a decision to take a human life is probably unparalleled in the human experience of a member of a civilized society; indeed, many agree on moral or religious grounds that it is incomprehensible that an advanced society such as ours should yet engage in such practice. Given the wightiness of the subject involved, it really does not follow that the improper exclusion of a relatively small number of the total veniremen examined does not prejudice the defendant's rights to an impartial cross-section of the community. Where, as here, unanimity of decision is required to impose the death sentence, the stark reality is that one improperly excluded juror may mean the difference between life or death for a defendant. Although a defendant certainly has no assurance that a properly empaneled jury will not impose the death penalty, it seems to us that in light of the vast difference in treatment which may result from the improper exclusion of a single veniremen, even that degree of error is prejudicial to the rights of a defendant in a capital case." Marion v. Beto, 434 F. 2d 29, 32 (5th Cir. 1970).

This Court has reversed convictions when only three veniremen were wrongfully excluded. See Segura v. Patterson, 403 U.S. 945 (1971), rev'g. 402 F. 2d 246 (10th Cir. 1968) and Ladetto v. Massachusetts, 403 U.S. 947 (1971), rev'g. 254 N.E. 2d 415 (1969).

A number of other courts have held that the wrongful exclusion of only one veniremen was reversible error. See, e.g., State v. Watson, 28 Ohio St. 2d 15, 57 Ohio Ops. 2d 95, 100 (1971), Woodards v. Maxwell, 303 F. Supp. 690, 51 Ohio Ops. 2d 337 (S.D. Ohio 1969), aff'd 430 F. 2d 978, 55 Ohio Ops. 2d 405 (6th Cir. 1970) and In Re Hillery, 79 Cal. Rptr. 773, 457 P. 2d 656 (Sup. Ct. 1969).

In the instant case, petitioner submits that eight veniremen, not merely one, were wrongfully excluded in violation of the Witherspoon mandates.

COURT: As the Court has said he has been charged with aggravated murder. In the event the State of Ohio proves both the charge and specifications in this case, in event that they prove both, the question of capital punishment or death in the electric chair will come into consideration. Now, are you opposed to capital punishment?

A. [MRS. McGINNIS]: Yes sir, I am.

Q. And how long have you had this feeling?

A. Ever since I can remember, I guess.

Q. Are there any circumstances in which you feel that capital punishment should be invoked?

A. Well, I have always thought there should be another way instead of capital punishment.

Q. Well, let me say this to you. If the facts in this particular case were such, could you vote for the consideration of the electric chair?

A. I might, but I don't know.

Q. Then your feeling against capital punishment is not firm, is that what you're saying?

A. Yes, What I mean is, I think there should be - there could be life imprisonment, something like that, instead of capital punishment.

Q. Instead of?

A. Yes.

Q. You would prefer that?

A. Yes, I would.

Q. Is that what you're saying?

A. Yes.

Q. But do you also feel that there are circumstances in which death in the electric chair should be invoked?

A. I don't think so.

Q. You don't think there's any case in which a person should be sent to the electric chair?

A. I don't think so."

Tr. III at 714-715.

The State then challenged this witness, defense counsel inquired and, after the next witness was excused for cause because of capital punishment views, this exchange occurred:

MR. PURNELL: Would the Court for the record state which cause you're excusing her for?

COURT: She vehemently objects to capital punishment. Under no circumstances could she change, nor under any circumstances would she vote for the death penalty. That's in both cases, in the Court's opinion.

MR. PURNELL: That is ...

COURT: McGinnis and Koltnow."

Tr. III at 721 [Emphasis added].

Obviously, Mrs. McGinnis was not "vehemently" opposed to capital punishment. She did not state that "under no circumstances could she change, nor under any circumstances would she vote for the death penalty.

Witherspoon clearly holds thatit must be "unmistakably clear" that a venireman would automatically vote against the imposition of capital punishment or that his attitude toward the death penalty would prevent him from making an impartial decision as to the defendant's guilt. 391 U.S. at 522 n. 21; Davis v. Georgia, 97 S. Ct. 399 (1976).

In the present case, the veniremen who were excluded for cause because of their views toward the death penalty did state strongly their opposition to capital punishment. However, their views cannot be said to have been made "unmistakably clear."

The trial judge failed to firmly instruct veniremen as to their duty to subordinate personal views to the commands of the law as explained by the Court. "Unmistakably clear" responses that veniremen would violate that duty because of their views on capital punishment could not be received.

Doubts concerning the ability of a venireman to subordinate his personal views to his oath as a juror to obey the law should be resolved against exclusion. Marion v. Beto, supra, 434 F. 2d at 32. As this Court declared in Boulden v. Holman, 394 U.S. 478, 483 (1969):

> "[I]t is entirely possible that a person who has 'a fixed opinion against' or who does not 'believe in' capital punishment might nevertheless be perfectly able as a juror to abide by existing law --- to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case."

Reserving doubts against exclusion is highly important; for under Ohio's new criminal laws, the jury does not consider the penalty, only the charge and specification. A venireman must be instructed that the law requires him to "subordinate his personal views to what he ... [perceives] to be his duty, to abide by his oath as a juror and to obey the law of the State," Witherspoon v. Illinois, supra, 391 U.S. at 514-515 n. 7. Despite general expressions of sentiment against the dealth penalty, it is still possible for venireman "to follow conscientiously the instructions of a trial judge."

Veniremen were never asked the precise nature of their general sentiments against capital punishment or whether they could follow the present law as explained to them by the trial judge. E.g., Tr. III at 713-717 and Tr. IV at 903-911.

The questioning of veniremen in this case was defective because it confused them as to their exact duty under the new Ohio statute. They were impliedly instructed that they would have responsibility for determining the sentence. These instructions implied that, if statutory aggravating circumstances were proved beyond a reasonable doubt, the death penalty would be required.

But the new capital punishment statute does not automatically require the imposition of a death sentence even if a statutory aggravating circumstance is proved beyond a reasonable doubt. The trial court may decline to impose the death penalty on the grounds that mitigating circumstances exist which mandate a lesser sentence. OHIO REV. CODE, §2929.04.

The trial court never clearly instructed each or all veniremen that they would have no role in sentencing. The veniremen were left in the dark as to their exact role under the Ohio procedure. Had they understood that sentencing was not their responsibility, it is possible that they might have been able to serve. But the voir dire examination did not enlighten them. E.g., Tr. VI at 1301-1312; Tr. V at 1145-1153.

Witherspoon explicitly stated that a juror could not be excluded for cause simply because he cannot bring in a death penalty in a "proper case."

> "[Veniremen] cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment." 391 U.S. at 522 n. 21.

Nevertheless, veniremen were excused for cause, at least in part, on the basis of their failure to imagine a proper case for the imposition of the death penalty. See, e.g., Tr. III at 715, 719 and Tr. VI at 1301-1312.

The exclusions in this case cannot be lightly brushed aside. In 1971, this Court reversed twenty-three cases from twelve state and federal

courts "insofar as they impose the death sentence." The cases were remanded for further proceedings in light of Witherspoon, Boulden and Maxwell. 403 U.S. 947 (1971).

Merely because the state does not exhaust its peremtory challenges does not justify improper exclusions of scrupled jurors. E.g., State v. Wigglesworth, 18 Ohio St. 2d 171, 47 Ohio Ops. 2d 388 (1969) rev'd 403 U.S. 947, on remand 28 Ohio St. 2d 28, 57 Ohio Ops. 2d 102 (1971).

Likewise, if the defense does not exhaust its peremptory challenges, this does not prevent reversal where there are impermissible exclusions. E.g., Childs v. North Carolina, 269 N.C. 307, 152 S.E. 2d 453 (1967) rev'd 403 U.S. 948 (1971) and Quintrana v. Texas, 441 S.W. 2d 191 (Tex. Cr. App. 1969) rev'd 403 U.S. 947 (1971).

Where there has been an improper exclusion, the judgment cannot be preserved merely because the "totality of the record" or because of voir dire examination as a whole did not "violate the spirit of Witherspoon." E.g., Speck v. Illinois, 41 Ill. 2d 177, 242 N.E. 2d 208 (1968) rev'd, 403 U.S. 946 (1971); Jaggers v. Kentucky, 439 S.W. 2d 580 (Ky. Ct. App. 1968) rev'd 403 U.S. 946 (1971); Harris v. Texas, 457 S.W. 2d 903 (Tex. Cr. App. 1970) rev'd 403 U.S. 947 (1971) and Adams v. Washington, 76 Wash. 2d 650, 458 P. 2d 558 (1969) rev'd 403 U.S. 947 (1971).

The fact that the trial judge was able to see and hear veniremen does not prevent a reversal when the veniremen's responses are equivocal. Aiken v. Washington, Wheat v. Washington, 75 Wash. 2d 421, 452 P. 2d 232 rev'd 403 U.S. 946 (1971).

The failure of the defense to object to an improper exclusion does not constitute a waiver of Witherspoon rights and cannot prevent a reversal. State v. Wigglesworth, supra; Harris v. Texas, supra.

The Witherspoon rule against exclusion applies where veniremen state they do not believe in the death penalty but do not unequivocally state that they would absolutely refuse to vote for its imposition in any case. Ladetto v. Massachusetts, 356 Mass. 541, 254 N.E. 2d 415 (1969) rev'd 403 U.S.

947 (1971) [strong feelings against the death penalty"]. Turner v. Texas, 462 S.W. 2d 9 (Tex. Cr. App. 1969) rev'd 403 U.S. 947 (1971) ["just don't believe" in the death penalty]. Segura v. Patterson, 402 F. 2d 249 (10th Cir. 1971) rev'd 403 U.S. 946 (1971) ["I don't think I can bring in the death penalty"]; Funicello v. New Jersey, 52 N.J. 263, 245 A. 2d 181 (1968) rev'd 403 U.S. 948 (1971) ["I don't think so"; "unsure" as to capability of voting for death penalty].

The Witherspoon rule against exclusion also applies where the ambiguous statement is as to the veniremen's capability to return a verdict of guilty. E.g., Wilson v. Florida, 225 So. 2d 321 (Fla. Sup. Ct. 1969) rev'd 403 U.S. 947 (1971) [scruples "very well might" affect his verdict; I "believe" I would refuse to return a verdict of guilty; I "would have difficulty" in finding defendants guilty of the penalty were death] and State v. Pruett, 18 Ohio St. 2d 167, 47 Ohio Ops. 2d 386 (1969) rev'd 403 U.S. 946 (1971) [veniremen evasive as to inability of returning verdict of guilty where the penalty was death].

Witherspoon principles cannot be avoided by the good intentions of the trial judge or the lack of specificity in the veniremen's statements. The only possible ground for proper exclusion is an "unmistakably clear" statement that the veniremen will "automatically" vote against the death penalty.

Where the statement can have any other connotation, or where it is not obvious that the veniremen understood the questions about his scruples in relation to his duty to consider all penalties, any exclusion is improper. Such improper exclusion of a single veniremen is error mandating that this Court vacate the death sentence.

CONCLUSION

Petitioner prays that the petition for a writ of a writ of certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of May, 1977, a copy hereof was mailed to Stephan M. Gabalac, Esq., prosecutor for Summit County, Ohio. I further certify that all parties required to be served have been served.

William R. Holland

Note: Appendix A, Is the Opinion of the Court in State v. Bayless, 48 Ohio St.2d (1976), and has not been reproduced here.